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With Constitutional Control of the Montana University System

# CONSTITUTIONAL CONTROL OF THE MONTANA UNIVERSITY SYSTEM: A PROPOSED REVISION

Laurence R. Waldoch\*

## INTRODUCTION

Article XI, Section 11 of the Montana Constitution provides that:

The general control and supervision of the state university and the various other state educational institutions shall be vested in a state board of education, whose powers and duties shall be prescribed and regulated by law. . . .<sup>1</sup>

This article will analyze the meaning and effect of this provision, review various decisions from other states with respect to control of state universities, and present a proposed alternative for the consideration of the framers of the new constitution.

Because of the wide variations in state constitutions with respect to control of public universities, the persuasiveness of decisions from other states is limited with regard to specific cases under a particular state constitutional clause.<sup>2</sup> For purposes of attempting to define what the role of the governing board<sup>3</sup> *should* be, however, such cases are very helpful. Despite differences in state constitutions, the essential question is the same in every state—what is the proper balance of authority between the board of regents and the state legislature with respect to the state university system?

The material below is based on the premise that a state university is fundamentally different from other state agencies in terms of its need for some degree of autonomous control. This point was made in the following terms by one college president:

Highways can be changed (although it is an expensive proposition) if mistakes are made; it is even possible to restock lakes and woods if conservation programs lack effective and continuing leadership and support, but it is virtually impossible to re-educate a generation or several generations of citizens who have been deprived of their rights through an educational system that is cramped or given imbalance by a state government that does not recognize the necessity of giving freedom to colleges and universities.<sup>4</sup>

While the necessity of allowing the regents, in cooperation with the faculty and others in the academic community, to make final decisions in the area of academic policy is generally recognized by legislators and

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<sup>1</sup>MONT. CONST. art. XI, §11.

<sup>2</sup>For a review of the role of the governing board in all fifty states, see CHAMBERS, HIGHER EDUCATION IN THE FIFTY STATES (1970).

<sup>3</sup>Hereinafter, the term "board of regents" will be used to refer to the governing board of the state university system. In Montana the constitution refers only to "state board of education," although the board is now commonly referred to as "state board of education, ex officio regents of the Montana university system."

<sup>4</sup>MOOS and ROURKE, THE CAMPUS AND THE STATE, 315 (1960).

other state officials, the relationship between academic policy and other external controls which may be imposed is often not understood.

Moos and Rourke explained this relationship as follows:

Where the onset of state control—administrative as well as political—threatens to strip away the authority of independent governing boards, it contains a grave threat to the intellectual as well as the institutional independence of a university. These two phases of university freedom cannot be disassociated. Intellectual freedom originally sprouted in an environment of institutional autonomy. It may well lose its vitality altogether if public colleges and universities are ever brought within the harness of conventional state administration. Preserving the authority of lay boards of trustees from state interference is as vital to the freedom of a university as the defense of freedom of teaching and research on the campus.<sup>5</sup>

Another writer has stated that "an independent . . . university is as essential to the community as an independent judiciary."<sup>6</sup> This article will review the failure of the present Montana Constitution to provide sufficient authority to the regents and will propose a revision which would provide such authority.

### DECISIONS FAVORING AUTONOMOUS CONTROL

The decisions discussed in this section are from states which have constitutional provisions regarding their respective universities that are different from either the present Montana Constitution or the proposal presented herein. These cases illustrate, however, that the necessary independence of the regents can be maintained without undue restriction of the powers and duties of the legislature and other departments of state government.

In an 1896 case,<sup>7</sup> the Michigan Supreme Court reviewed the background of the decisions by the framers of the state constitution to place the control and management of the university under a permanent board of regents. It made the following comment with respect to a report of an 1840 legislative committee:

No more forcible argument could well be made than is found in that report for placing the entire control of the university in the hands of a permanent board, and taking it away from the legislature. . . . I quote from that report as follows: 'No state institution in America has prospered as well as independent colleges, with equal, and often with less, means. Why they have not may be ascribed, in part, to the following causes: They have not been guided by that oneness of purpose and singleness of aim (essential to their prosperity) that others have whose trustees are a permanent body, —men chosen for their supposed fitness for that very office, and who, having become acquainted with their duties, can and are disposed to pursue a steady course, which inspires confidence and insures success, to the extent of their limited means. State institutions, on the contrary, have fallen into the hands of the several legislatures, fluctuating bodies of men, chosen with reference to their supposed qualifications for other duties than cherishing literary

<sup>5</sup>*Id.* at 289-90.

<sup>6</sup>CHAFEE, *THE BLESSINGS OF LIBERTY*, 241 (1960).

<sup>7</sup>*Sterling v. Regents of the University of Michigan*, 110 Mich. 369, 68 N.W. 253 (1896).

institutions. When legislatures have legislated directly for colleges, their measures have been as fluctuating as the changing material of which the legislatures were composed. . . .<sup>8</sup>

The court stressed the need for a permanent board of trustees with a slowly changing membership to govern the university. It described the results of frequent changes in the governing board in the following terms:

At first they dig up the seed a few times, to see that it is going to come up; and, after it appears above the surface, they must pull it up to see that the roots are sound; and they pull it up again, to see if there is sufficient root to support so vigorous branches; then lop off the branches, for fear they will exhaust the root, and then pull it up again, so see why it looks so sickly and pining, and finally to see if they can discover what made it die. And, as these several operations are performed by successive hands, no one can be charged with the guilt of destroying the valuable tree.<sup>9</sup>

The improvement in the condition of the university, which occurred subsequent to the transfer of control of the university to the board of regents from the legislature in the constitutional convention of 1850, was discussed by the court. It pointed out that the regents assumed a strong role under the constitution and "for 46 years have declined obedience to any and every act of the legislature which they, upon mature reflection and consideration, have deemed against the best interest of the institution."<sup>10</sup> The court further pointed out that it had sustained the regents on every occasion on such matters.

The basis upon which the constitutional authority to govern the university was granted to the regents was also considered by the court. The opinion stated that:

Obviously, it was not the intention of the framers of the constitution to take away from the people the government of this institution. On the contrary, they designed to, and did, provide for its management and control by a body of eight men elected by the people at large. They recognized the necessity that it should be in charge of men elected for long terms, and whose sole official duty it should be to look after its interest, and who should have the opportunity to investigate its needs, and carefully deliberate and determine what things would best promote its usefulness for the benefit of the people. . . .<sup>11</sup>

The constitutions of several states have established the governing boards of their respective state universities or land-grant colleges as constitutional corporations.<sup>12</sup> The nature of such a constitutional corporation was described by the Michigan Supreme Court in *Board of Regents v. Auditor-General* as follows:

<sup>8</sup>*Id.* at 755.

<sup>9</sup>*Id.*

<sup>10</sup>*Id.* at 256.

<sup>11</sup>*Id.*

<sup>12</sup>CHAMBERS, *THE COLLEGES AND THE COURTS*, 63 (1952). Chambers lists Michigan, Minnesota, California, Idaho, Colorado, Oklahoma (land-grant institutions) and Utah as having state universities with the status of constitutional corporations. Depending upon the standard applied, this list may be altered to some extent by the erosion in recent years in the authority of the regents in some of these states.

[It] is made the highest form of juristic person known to the law, a constitutional corporation of independent authority, which, within the scope of its functions, is co-ordinate with and equal to that of the Legislature.<sup>13</sup>

The question of whether a state university is granted status as a constitutional corporation has been somewhat overemphasized in the past. The fact that a university has corporation status does not guarantee its constitutional authority will be protected from infringement by other branches of state government.<sup>14</sup> Similarly, the fact that a university is without corporate status does not mean that the control placed in the board of regents may be usurped by other agencies at will.<sup>15</sup> The primary question is whether the essential control of the university is to be placed in a board of regents and whether, in a particular case, that control is improperly infringed upon by the legislative or administrative branches of state government.

The power to control expenditures of university funds is of crucial importance to the regents if they are to direct the university generally. It is important to avoid confusing this problem with the appropriation of funds to the university by the legislature. While the expenditure of funds is a matter over which the regents should be given full authority, the determination of the amount of money which should be appropriated to the university is, of course, a matter within the province of the legislature.

The type of problem which typically arises in this area is illustrated by *State ex rel. University of Minnesota v. Chase, State Auditor*, in which the regents of the University of Minnesota brought an action against the state auditor to require him to approve voucher and issue his warrant in payment of an item of expense incurred by the regents with respect to a preliminary survey for the purpose of installing a plan of group insurance for members of the faculty and other permanent employees of the university.<sup>16</sup> The court outlined the issues as follows:

On the surface of things, the contest is between the board of regents and the commission of administration and finance, hereinafter mentioned only as the commission. But the real issue is between the regents and the governor, made for them by chapter 426, G. L. 1925, 'An act in relation to the organization of the state government.' The purpose of the law is to centralize administrative responsibility in the Governor. . . . The commission, with entire candor, 'claims authority to supervise and control the expenditure of any and all moneys' by or for the University; 'the making of all contracts' by the several officers, departments and agencies of the state government, including the University and the board of regents; and that the latter cannot lawfully expend any money, from whatever source derived, for University support and administration 'for any purpose or object which has been disapproved' by the commission or incur

<sup>13</sup>167 Mich. 444, 132 N.W. 1037 (1911).

<sup>14</sup>See *infra* note 25 and accompanying text.

<sup>15</sup>See *infra* note 64 and accompanying text.

<sup>16</sup>175 Minn. 259, 220 N.W. 951 (1928).

financial obligation for such purpose or object. The right so to control University finances is the power to dictate academic policy and direct every institutional activity." (Emphasis added)

The recognition of the effect of financial control on academic policy and other university activities is an essential step in the process of balancing the authority of the regents with that of the legislature and other state officers. The court stated that its decision did not mean that the regents were "an independent province or beyond the law-making power of the legislature," but that since the constitution had vested the "whole executive power of the university" in the regents, no part of that authority could be exercised or put elsewhere by the legislature.<sup>18</sup> It therefore held that the auditor had no authority to refuse to issue the warrant and that he could not be given a veto power over university expenditures.<sup>19</sup>

In the *Sterling* case the court declared invalid an act which would have forced the regents of the University of Michigan to establish a medical college in the city of Detroit and discontinue the existing medical college in Ann Arbor. After pointing out that the constitution provided that the regents "shall have the direction and control of all expenditures from the university interest fund," the court stated:

The power therein conferred would be without force or effect if the legislature could control these expenditures by dictating what departments of learning the regents shall establish, and in what places they shall be located. Neither does it need any argument to show that the power contended for would take away from the regents the control and direction of the expenditures from the fund. The power to control these expenditures cannot be exercised directly or indirectly by the legislature. It is vested in the board of regents in absolute and unqualified terms.<sup>20</sup>

The line between the authority of the regents to control expenditures of funds and the authority of the legislature to appropriate such funds is particularly difficult to draw in cases involving appropriations to which specific conditions have been attached by the legislature. The right of the legislature to impose such conditions on appropriations was described in the following terms by the Idaho Supreme Court:

When an appropriation of public funds is made to the University, the Legislature may impose such conditions and limitations as in its wisdom it may deem proper. If accepted by the regents, it is coupled with the conditions, and can be expended only for the purposes and at the time and in the manner prescribed, and can be withdrawn from the state treasury only as provided by law.<sup>21</sup>

<sup>17</sup>*Id.* at 952.

<sup>18</sup>*Id.* at 954. The court stated that "generally the distinction between the jurisdiction of the Legislature and that of the Regents is that between legislative and executive power."

<sup>19</sup>*Id.* at 955. See also, *State Board of Agriculture v. Fuller, Auditor General*, 180 Mich. 349, 147 N.W. 529 (1914).

<sup>20</sup>*Sterling v. Regents*, *supra* note 7 at 257. See *contra*, *State ex rel. Bushee v. Whitmore*, 85 Neb. 566, 123 N.W. 1051 (1909).

<sup>21</sup>*State ex rel. Black v. State Board of Education*, 33 Idaho 415, 196 P. 201 (1921).

Such conditions may not be of such a nature as to constitute an infringement upon the constitutional authority of the regents, however. After referring to a previous case<sup>22</sup> in which the court had upheld the authority of the legislature to attach "any conditions it may deem expedient and wise . . ." the court interpreted the decision as follows:

Clearly, in saying that the Legislature can attach to an appropriation any condition which it may deem expedient and wise, the court had in mind only such a condition as the Legislature had power to make. It did not mean that a condition could be imposed that would be an invasion of the constitutional rights and powers of the governing board of the college. It did not mean to say that in order to avail itself of the money appropriated the state board of agriculture must turn over to the Legislature management and control of the college, or of any of its activities.<sup>23</sup>

The court conceded that it is not an easy matter to separate control of the expenditure of money for a certain activity from control of the activity itself, but held that activities which were controlled by the board of agriculture under the constitution could not be subjected to the supervision of the state administrative board.<sup>24</sup>

Most problems in this area can be avoided by a refusal on the part of the courts to allow the legislature to impose conditions which in effect transfer control over expenditures from the regents to state administrative departments. While certain restrictions imposed directly by the legislature—such as limits on salary increases, travel restrictions and other similar matters—may to some extent infringe upon the authority of the regents, the greater infringement is likely to occur where authority is transferred to other administrative bodies.

### DECISIONS NARROWLY CONSTRUING REGENT AUTHORITY

Ultimately, the maintenance of a state university system with a sufficient degree of self-determination and autonomy depends less upon the wording of the state constitution than upon such factors as the degree of support given to educational institutions within the state, the degree to which the role and authority of the regents is understood by the regents themselves and university administrators, and the degree to which the legal concepts involving the role of the regents are understood by the supreme court of the state. The failure of a strongly-worded constitution to protect the university from adverse decisions by the state supreme court is illustrated by the case of *University of Utah v. Board of Examiners*.<sup>25</sup> The action was brought by the regents of the University of Utah against the board of examiners of the state, the commissioner of finance, the attorney general, the state auditor and the state treasurer, alleging that the defendants were improperly assert-

<sup>22</sup>Weinberg v. Regents, 97 Mich. 246, 56 N.W. 605 (1893).

<sup>23</sup>State Board of Agriculture v. State Administrative Board, 226 Mich. 417, 197 N.W. 160 (1924).

<sup>24</sup>The case involved the question of whether the state administrative board could control expenditures for agricultural extension work.

<sup>25</sup>4 Utah 24, 408, 295 P.2d 848, (1956).

ing the legal right to exercise control over the management of the university in derogation of the authority granted to the regents by Article X, Section 4, of the Utah Constitution. Article X, Section 4 provided that all rights previously granted to the university and the agricultural college were perpetuated.<sup>26</sup> The key language of Chapter IX, Laws of Utah 1892, approved February 17, 1892, which established the rights which were perpetuated by the constitution was quoted by the court as follows:

Sec. 1 . . . It [the University of Utah] shall be deemed a public corporation and be subject to the laws of Utah, from time to time enacted, relating to its purposes and government, and its property, credits and effects shall be exempt from all taxes and assessments. . . . Sec. 3 The government of the University and the management of its property and affairs is vested in a board of nine regents, . . .<sup>27</sup>

On the basis of this language, the lower court declared unconstitutional certain statutes which treated the university as other state institutions, including statutes requiring preaudit of bills, submission of work programs and deposits of university funds into the state treasury.<sup>28</sup>

After pointing out that it was not called upon to decide whether an autonomous university is better than a legislatively-controlled university, the court analyzed at length the distinctions between the constitutions of the states of Minnesota, Idaho, Michigan and other states as opposed to the constitution of Utah. The court pointed out that most of the language from such states as Minnesota, Michigan and Idaho was identical to that of the Utah constitution, but that the phrase that the university would ". . . be subject to the laws of Utah, from time to time enacted, relating to its purposes and government" meant that the University of Utah was not a constitutional corporation beyond legislative control. The court held that under Utah law the constitution

. . . is in no manner a grant of power, it operates solely as a limitation on the legislature, and an act of that body is legal when the constitution contains no prohibition against it. . . .<sup>29</sup>

The court pointed out that for over fifty years the university had never raised the issue of independent control, but during that period had accepted the doctrine that it was "subject to the laws of the state." It pointed out that in certain past cases, the university had adopted a position which specifically recognized legislature control.<sup>30</sup> The practical reason for the failure of the regents to assert their authority was described by the court as follows:

In those early days the Regents were not disposed to tell the Legislature to leave them alone. They weren't taking any chance on offending Santa Clause.<sup>31</sup>

<sup>26</sup>*Id.* at 349.

<sup>27</sup>*Id.* at 352.

<sup>28</sup>*Id.* at 350.

<sup>29</sup>*Id.* at 361.

<sup>30</sup>*Id.* at 363.

<sup>31</sup>*Id.* at 366.



The court further reasoned that:

It must be conceded that had its Regents in those early years asserted its independence from the Legislature, it is doubtful that it would have attained a stature which would induce it to declare its independence.<sup>32</sup>

There can be no question that the court was correct in its determination that the constitution of Utah was distinguishable from those of other states having universities with rights of constitutional corporations. In its 23-page opinion, however, the court failed to devote a single word to the central issue before it—whether the acts in question were contrary to the clear statement that “the government of the university and the management of its property and affairs is vested in a board of nine regents. . . .” The court failed to consider, for example, whether the fact that not a penny could be spent by the regents without the permission of the board of examiners left the regents with any authority other than that which the board of examiners may choose to voluntarily grant.

The court made no attempt to determine whether the regents could be “subject to the laws of Utah” while still managing the property and affairs of the university. It failed to consider whether these two seemingly contradictory phrases could be interpreted in such a manner that both phrases would survive. Rather, it reached a decision which left the regents with absolutely no power except that which the legislature may wish to grant. Article X, Section 4 of the constitution of Utah was essentially “read out” of the constitution by the court.

The manner in which the university initiated the law suit could be partially responsible for the result reached by the court. The lower court holding in the form of a declaratory judgment that the university was a constitutional corporation free from the control of the legislature, administrative bodies, commissions and agencies and officers of the state,<sup>33</sup> is clearly impossible to defend in view of the provision that the university shall be subject to the laws of Utah. A broad, declaratory judgment defining the nature of the regent’s authority is both unnecessary and unwise. The regents should simply have refused to comply with a particular legislative act which they considered to be an infringement upon their authority. They could then have argued that while they were admittedly subject to the laws of Utah, the particular law involved violated the clause which vested in the regents the management of the affairs of the university.

In reviewing the results which it felt would follow if it declared the acts in question unconstitutional, the court argued that the uni-

<sup>32</sup>*Id.* at 368. It is impossible to determine whether this speculation played a substantial role in the court’s decision. It is submitted however, that the court is wrong with respect to such speculation, as evidenced by such universities as those of Michigan and Minnesota, neither of which have been “punished” for their independence.

<sup>33</sup>*Id.* at 349.

versity and the regents would have "... a blank check enabling them to expend all funds without any semblance of supervision or control."<sup>34</sup> The court stated that:

To hold that respondent has free and uncontrolled custody and use of its property and funds, while making the State guarantee said funds against loss or diversion is inconceivable.<sup>35</sup>

Again, the court failed to consider whether there is some middle ground between "free and uncontrolled custody and use of its property and funds" and the situation approved by the court in which the university was left without power to spend any funds without the approval of the board of examiners. Several states have upheld the constitutional authority of their regents to control state universities without considering such regents to be uncontrolled and beyond all restraint of the legislature.<sup>36</sup>

### MONTANA DECISIONS

Since the basic aim of this article is to present an analysis of how the relationship between a state board of regents and other state departments should be established by the state constitution, no attempt will be made to fully review the current state of the law in Montana with respect to the authority of the regents. The material below is presented to indicate that the Montana Supreme Court has given little effect to Article XI, Section 11 of the constitution which vests the general control and supervision of the state university in the board of education. While the court has in some cases protected the university from infringement upon statutory authority granted by the legislature, there have been no cases in which the court has relied upon the constitutional clause to limit the legislature in its direction of university affairs.

The authority of the regents to hold and disburse university funds was upheld by the court in *State ex rel. Koch v. Wright, State Treasurer*.<sup>37</sup> The action was brought by the treasurer of the state agricultural college to force the state treasurer to turn over to him proceeds from the sale of bonds issued by the state board of land commissioners pursuant to certain statutes. Section 1636 of the political code of 1895 was quoted as follows:

Immediately upon the receipt of the money, the proceeds of the sale of said bonds, the state treasurer shall turn the same over to the treasurer of the agricultural college, and it shall be disbursed by him on orders of the executive board of the said agricultural college . . . provided, however, that the general supervision of the

<sup>34</sup>*Id.* at 370

<sup>35</sup>*Id.* The court also pointed out that the holding sought by the regents would allow them to authorize out-of-state travel for university employees without previous approval by the board of examiners. No consideration was given to the question of whether this type of decision was an "affair of the university," the control of which was given to the regents by the constitution.

<sup>36</sup>Note, 55 MICH. L. REV. 728 (1957).

<sup>37</sup>17 MONT. 77, 42 P. 103 (1895).

construction and erection of such building or buildings, and the furnishing and equipping thereof, shall be under the control of the state board of education.<sup>38</sup>

In a one paragraph opinion, the court held that the state treasurer was bound to turn over to the treasurer of the state agricultural college the proceeds of the sale of bonds issued immediately upon receipt of the money and that the proper disbursement of such fund was a matter with which the state treasurer had no concern. While the decision makes no mention of the constitutional provision relating to the authority of the regents, it does indicate that in the period shortly after the constitutional convention of 1889, both the legislature and the court gave effect to the broad grant of authority provided to the regents by the constitution.

The authority to control university funds was again approved in 1901 in *State ex rel. Koch v. Barrett, State Treasurer*.<sup>39</sup> The court held that the land-grant funds provided by the federal government were to be disbursed through the executive board of the agricultural college and the state board of education and were not subject to Article VII, Section 20 of the constitution which provides that claims against the state other than for the salary of a public officer should be audited and allowed by the state board of examiners and paid only on the warrant of the state auditor. As in the earlier 1895 case, the court again relied upon statutory authority which had been granted to the board of education in reaching its decision. The court described the powers and duties of the board of education as "very extensive" and quoted from Section 1516 of the political code as follows:

The powers and duties of said board shall be as follows:

(1) They shall have the general control and supervision of the state university and the various state educational institutions. (2) To adopt rules and regulations, not inconsistent with the constitution and laws of this state, for its own government and proper and necessary for the execution of the powers and duties conferred upon them by law. (3) To prescribe rules and regulations for the government of the various state educational institutions. . . . (10) To receive from the state board of land commissioners or other boards or persons, or from the government of the United States, any and all funds, incomes and other property to which any of the said institutions may be entitled, and to use and appropriate the same for the specific purpose of the grant or donation, and none other and to have general control of all receipts and disbursements of any of said institutions.<sup>40</sup>

The court quoted with approval the following language from an earlier case involving the university bond fund:

It is evident furthermore that the act of the legislature providing for the erection of the university building did not contemplate that claims arising under the terms of the contract for the buildings should be subject to approval by the state board of examiners.<sup>41</sup>

<sup>38</sup>*Id.*

<sup>39</sup>25 Mont. 62, 66 P. 504 (1901).

<sup>40</sup>*Id.* at 506.

<sup>41</sup>*Id.* at 507. The court was quoting its earlier decision in *State v. Collins*, 21 Mont. 448, 53 P. 1114 (1898).

Although it is submitted that the court should not be unduly influenced by legislative enactments in defining the scope of authority of the regents under Article XI, Section 11 of the constitution, it is evident from the above two cases that early legislators considered the authority of the board of education to be very broad.

The reliance by the court, as well as the regents themselves, upon legislative grants of authority eventually led to the conclusion that the legislature was in no way restricted in defining or limiting the scope of authority of the board. In *State v. Brannon*<sup>42</sup> the Montana Supreme Court upheld an act requiring the chairman of the department of chemistry of the state College of Agriculture and Mechanic Arts to analyze and test samples of gasoline submitted to him by the public service commission without compensation. The court rejected the argument that the statute infringed upon the constitutional authority of the regents to control and supervise the university. It stated that:

The board of education is a part of the executive department, and is but an agency of the state government. The Legislature may prescribe the extent of the powers and duties to be exercised by the board in the general control and supervision of the University of Montana. The Legislature may broaden the functions of the University, or any of its units. It may require research and experimental work to a greater extent than is now being carried on, and for the public benefit may require the discharge of functions in new fields. In other words, the state may extend, and add power to, its developmental arm.<sup>43</sup>

The argument that the board of education is "within the scope of its functions, coordinate and equal with the legislature" was also rejected by the court.<sup>44</sup> The court merely pointed to Article I, Section 4, of the state constitution, which provides that the powers of government of the state are divided into the legislative, executive and judicial branches.

While the court can hardly be criticized for rejecting the over-generalized argument that the board is "equal with the legislature" within the scope of its functions, it failed to consider whether the constitutional authority of the board to control and supervise the state university had been infringed upon by the legislature. After quoting Article XI, Section 11, the court stated as follows:

Observe the care employed in the construction of this sentence. The general control and supervision of the State University and the various other educational institutions are vested in the state board of education whose powers and duties shall be prescribed and regulated by law. A law may be enacted by the people exercising the initiative or by the people acting through the Legislature. In either case the power to enact a law is illimitable, except as restrained by the Constitution. (Cases cited) (Emphasis by the court)<sup>45</sup>

<sup>42</sup>86 Mont. 200, 283 P. 202 (1929).

<sup>43</sup>*Id.* at 208.

<sup>44</sup>*Id.*

<sup>45</sup>*Id.*

This analysis by the court can be criticized on two grounds: First, the court failed to consider whether the legislature was prescribing powers and duties of the board, or "controlling and supervising the university." It may be argued that the legislature's power to prescribe duties of the board does not include the power to carry out those duties by assigning particular tasks to a professor. Secondly, the court failed to recognize that excessive emphasis on the authority of the legislature to prescribe powers and duties of the board may have the effect of eliminating the entire clause from the constitution. It is clear that if this clause were not present in the constitution, the legislature would have authority to create a state university and create a board to administer it. The difference would be that the legislature would be completely unrestrained in prescribing or even eliminating the authority which it had granted to such a board.

The nature and extent of the authority of the board of education was further discussed by the Montana Supreme Court in the 1963 case of *Brown v. State Board of Education*.<sup>46</sup> The case involved the question of whether the board could delegate authority to the president of one of the university units to hire instructors and whether the board had in fact made such an authorization. Plaintiff alleged that she had a contract of employment for the summer session of 1962 and was entitled to \$1300 for the two month period. The contract had been approved by the college administrators but had not been formally approved by the board of regents. The plaintiff asserted that an express statute authorized the board to delegate to the president and faculty the selection of teachers and other employees. The court quoted R.C.M. 1947, Section 75-107 as follows:

Powers and duties, The state board of education shall have power and it shall be its duty: . . .

12. To choose and appoint a president and faculty for each of the various state institutions named herein, and to fix their compensation. . . .

14. To confer upon the executive board of each of said institutions such authority relative to the immediate control and management, other than financial, and the selection of the faculty, teachers, and employees, as may be deemed expedient, and may confer upon the president and faculty such authority relative to the immediate control, and management, other than financial, and the selection of teachers and employees, as may by said board be deemed for the best interest of said institutions." (Emphasis supplied by court)

A careful reading of the emphasized portion of Section 75-107 makes it difficult to accept the position taken by the board and the court. It is equally plausible to read the phrase, "other than financial" as a modification of the terms "management" and "control," and conclude that the board may grant to the president and faculty "authority relative to . . . the selection of teachers and employees."

<sup>46</sup>142 Mont. 547, 385 P.2d 643 (1963).

<sup>47</sup>*Id.* at 646.

The court concluded as a separate matter that no delegation of power by the board was attempted and that no implied power to contract was shown.<sup>48</sup> The case could have been decided simply on the basis of this conclusion without any discussion of whether the board *could* delegate such authority. Thus, the court's discussion of statutory limitations on the authority of the board may be regarded as dicta.

The essential point in *Brown* with respect to the basic authority of the regents, however, is not whether the court and the board were correct in their interpretation of the statute but whether the statute should have been given any effect if it was in fact a limitation on the authority of the regents to select academic personnel. The question of whether the authority to control academic personnel policies is included in "the general control and supervision of the state university . . ." under Article XI, Section 11 of the Montana Constitution was not discussed by the court nor raised by any of the parties.

The position taken by the board in this case was clearly harmful to its own interest. The entire matter in controversy could have been cleared up administratively for future cases, and the board could have simply conceded in this particular case. To argue before the supreme court that this question was controlled by statute indicates a failure by the board and its legal counsel to understand the nature of the constitutional grant of authority.<sup>49</sup>

The primary question concerning the present language of Article XI, Section 11, is whether the authority of the legislature to prescribe and regulate powers and duties of the board is in any way limited by the phrase, ". . . the general control and supervision of the state university and the various other state educational institutions shall be vested in a state board of education. . . ." As indicated by the *Brannon* and *Brown* decisions, the supreme court appears to take the position that the legislature may prescribe and regulate duties and powers of the board of education without limitation. The failure of the court to make any attempt to balance these two phrases should be given serious consideration by the framers of the new Montana Constitution.

<sup>48</sup>*Id.* at 647.

<sup>49</sup>The board of education was represented by the Attorney General in this case. The question of whether the attorney general's membership on the board makes him the legal counsel for the board has never been clarified. While the board and various attorney generals have apparently assumed that the Attorney General is necessarily the attorney for the board, this writer strongly disagrees with such an assumption. The authority of the board to hire independent, nonpolitical legal counsel is crucial and should be exercised by the board. *See also, People v. Barrett*, 382 Ill. 321, 46 N.E.2d 951 (1943), where it was held that the University of Illinois board of regents was not an agency of the state but a separate corporate entity which functions as a public corporation and was therefore entitled to employ its own counsel and that such functions were not the duty of the attorney general.

### INTERPRETATION OF "PRESCRIBED AND REGULATED BY LAW"

Other courts have approached this type of question in a more analytical way and reached decisions which give effect to both the grant of authority to the regents and the limitation of that authority. The Idaho Supreme Court was faced with this question in a 1921 case involving the issue of whether the regents could spend university funds held by the state treasurer without first submitting all claims to the state board of examiners for approval.<sup>50</sup> The court pointed out that the state constitution vested in the regents "the general supervision of the University, and the control and direction of all of the funds of, and appropriations to, the University, *under such regulations as may be prescribed by law.*"<sup>51</sup> (Emphasis by the court) The court acknowledged that the emphasized phrase distinguished Idaho's constitution from those of such states as Michigan and Minnesota, but it concluded that the board was a constitutional corporation with independent authority, and made the following statement:

The regulations which may be prescribed by law, and which must be observed by the regents in their supervision of the University, and the control and direction of its funds, refer to methods and rules for the conduct of its business and accounting to authorized officers. Such regulations must not be of a character to interfere essentially with the constitutional discretion of the board, under the authority granted by the Constitution. (Emphasis added)<sup>52</sup>

Thus in limiting the regulations which may be prescribed by law to those which did not essentially interfere with the constitutional authority granted to the regents by the constitution, the court preserved both the grant of authority and the limitation on that authority.

A similar approach was taken by the supreme court of Nevada in *King v. Board of Regents of the University of Nevada*, where the court declared unconstitutional an act creating an advisory board of regents of Nevada State University.<sup>53</sup> The court quoted Article XI, Section 4 of the Nevada constitution as follows:

The legislature shall provide for the establishment of a state university, which shall embrace departments for agriculture, mechanic arts and mining, to be controlled by a board of regents, whose duties shall be prescribed by law.<sup>54</sup>

The court further pointed out that the constitution provided that at the expiration of the term of office of the original board of regents "... the legislature shall . . . provide for the election of a new board of regents, and define their duties."<sup>55</sup>

<sup>50</sup>State *ex rel.* Black v. State Board of Education, 33 Idaho 415, 196 P. 201 (1921).

<sup>51</sup>*Id.* at 204.

<sup>52</sup>*Id.*

<sup>53</sup>65 Nev. 533, 200 P.2d 221 (1948).

<sup>54</sup>*Id.* at 222.

The opinion stated that it is well settled that the legislature is without power to abolish a constitutional office "or to change, alter or modify its constitutional powers and functions."<sup>56</sup> The court reasoned that:

The immediate problem before us is to determine whether the act in question does or does not 'change, alter, or modify (the) constitutional powers and functions' of the board of regents created by the constitution. If it does so, then under the well settled rule . . . we must hold the act invalid.<sup>57</sup>

On this basis the court held that the creation of an "advisory" board of regents with many of the same rights and privileges as the board itself was unconstitutional as an infringement upon the authority of the regents. It gave no effect to a savings clause in the act which provided that "no provision of this act shall be construed to be in derogation of the constitutional authority of the elected board of regents to administer the affairs of the university. . . ."<sup>58</sup>

The case of *Serling v. Regents of the University of Michigan*<sup>59</sup> in which the Michigan Supreme Court declared unconstitutional a statute which would have forced the University of Michigan to relocate its medical school was cited with approval. The court recognized that the phrase "under such regulations as may be provided by law" was not present in the Michigan constitution, but stated that:

If we are correct in concluding that the defining of duties is one thing, and that the creating of a new board with equal rights and privileges (with the exception noted) is an entirely different thing, then the Michigan case (with whose philosophy we are in entire accord) becomes authority of the highest rank.<sup>60</sup>

The court analyzed the case of *University of Minnesota v. Chase* in a similar manner:

We note again frankly that there was lacking in the Minnesota constitutional provision the reservation to the legislature of the right to fix the duties of the regents, but as above noted, encroachment on constitutional functions cannot be justified in the guise of defining duties, so that the lack of the Nevada clause in the Minnesota constitution does not weaken the authority of the Minnesota case.<sup>61</sup>

Thus, in the *King* case, as in *Black*, the court interpreted the phrase "under such regulations as may be prescribed by law" in a manner such that it did not weaken the basic grant of authority to the regents to control the state university.<sup>62</sup>

<sup>55</sup>*Id.* at 223.

<sup>56</sup>*Id.* at 227.

<sup>57</sup>*Id.*

<sup>58</sup>*Id.* at 222.

<sup>59</sup>*Serling v. Regents, supra* note 7 at 233.

<sup>60</sup>*King v. Board, supra* note 53 at 231.

<sup>61</sup>*State ex rel. University of Minnesota v. Chase, supra* note 16 at 951.

<sup>62</sup>*King v. Board, supra* note 53 at 233. *See also, Dreps v. Regents of the University of Idaho*, 65 Idaho 88, 139 P.2d 467 (1943).



As these two decisions indicate, the extent of authority of a board of regents must be defined with respect to the particular dispute at hand rather than in terms of broad generalities. Each judicial decision should involve a balancing of the authority of the regents to control the university with that of the legislature to enact laws which may limit such control.

### NATURE OF REGENT AUTHORITY — PROPOSED CRITERIA

The failure of many boards of regents to understand the nature of their authority as well as the limitations on that authority has contributed to a similar lack of understanding by the courts. Rather than relying on unrealistic theories of complete immunity from legislative acts, those who wish to protect regent authority should attempt to define that authority on the basis of whether the specific statute in question will substantially interfere with the overall direction and management of the university. An understanding of the manner in which courts have treated such questions in the past is essential for the proper drafting of a new constitution. The cases discussed below will provide some additional indication of the types of considerations which have been used to determine whether particular types of authority fall within the province of the regents or within that of the legislature.

With respect to the authority to control personnel policies, the Idaho Supreme Court held that the University of Idaho and its regents were not subject to a nepotism act passed by the state legislature. The court stated:

... the legislature possesses no power to place any restrictions on the Board of Regents in the matter of their employment of professors, officers, agents or employees; nor can they tell the Board whom they may and may not appoint.<sup>63</sup>

Similarly in a 1949 case the Supreme Court of Arizona refused to allow legislative encroachment on the authority of the regents to control policies regarding nonacademic employees as well.<sup>64</sup> In a unanimous opinion the court stated that:

To permit legislation to throw the employment and supervision of all personnel under the civil service law, except the teaching staff, would necessarily deprive the board of regents of a large portion of its constitutional supervisory power. We have no hesitation in holding that such legislation runs counter to article 11, section 2, Arizona constitution.<sup>65</sup>

It should be pointed out that Article XI, Section 2 of the Arizona Constitution to which the court referred is not particularly a "stronger" section than Article XI, Section 11 of the Montana Constitution. It states that:

<sup>63</sup>Dreps v. Regents, *supra* note 62.

<sup>64</sup>Hernandez v. Frohmler, 68 Ariz. 242, 204 P.2d 854 (1949).

<sup>65</sup>*Id.* at 860.

The general conduct and supervision of the public school system shall be vested in a state board of education, a state superintendent of public instruction, county school superintendents, and such governing boards for the state institutions as may be provided by law.<sup>65</sup>

In a later case the court made it clear that this decision was not intended to place the regents beyond the authority of the legislature.<sup>67</sup> By upholding a legislative act providing for review of university expenditures by the state auditor, the court made it clear that it intended to consider the degree to which the particular act complained of infringed upon the authority of the regents, rather than to attempt to decide in general terms whether the regents are or are not subject to the control of the legislature.

It is obvious that however autonomous a university may be, it has no authority to take actions which are prohibited by the state or federal constitutions. This was pointed out in dicta in *State ex rel. Sholes v. University of Minnesota*,<sup>68</sup> where plaintiff brought a mandamus action against the university and the regents to compel the adoption of rules and regulations prohibiting the use of university property for the teaching of religious doctrine or in any aid of religion except for purely secular use essential to teaching. The court stated that:

It goes without saying that the board of regents has no discretionary power to do or permit any activity which is in contravention of the powers conferred upon it by its charter, nor may it evade the constitutional proscription of forbidden activities under the guise of the exercise of its discretionary powers or of its legislative function. . . .<sup>69</sup>

The court found no evidence, however, that the university had attempted to engage in activities which violated the constitution. It therefore held that the remedy of mandamus was not available to plaintiff.

Several Michigan cases indicate that an autonomous university is not necessarily free from all laws and policies of the state. In holding that the board of regents of the University of Michigan was subject to a statute declaring that the defense of governmental immunity to tort actions no longer existed, the court stated that "in spite of its independence, the Board of Regents remains a part of the government of the state of Michigan."<sup>70</sup> Since the doctrine of sovereign immunity had been overturned by both the supreme court and the legislature of the state, the court held that the doctrine no longer existed in Michigan with respect to the university or any branch of state government. The court stated that:

It is the opinion of this Court that the legislature can validly exercise its police power for the welfare of the people of this state, and a constitutional corporation such as the Board of Regents of the University of Michigan can lawfully be affected thereby. The Uni-

<sup>65</sup>ARIZ. CONST. art 11, § 2.

<sup>67</sup>Board of Regents v. Frohmiller, 69 Ariz. 50, 208 P.2d 833 (1949).

<sup>68</sup>236 Minn. 452, 54 N.W.2d 122 (1952).

<sup>69</sup>Id. at 129.

<sup>70</sup>Branum v. State of Michigan and Board of Regents, 5 Mich.App. 134, 145 N.W.2d 860 (1966).

versity of Michigan is an independent branch of the government of the state of Michigan, but it is not an island. Within the confines of the operation and the allocation of funds of the University, it is supreme. Without these confines, however, there is no reason to allow the Regents to use their independence to thwart the clearly established public policy of the people of Michigan.<sup>71</sup>

The Supreme Court of Michigan has also upheld statutes benefitting public employees which affect the University of Michigan. With respect to an act giving employees the right to join labor organizations and to engage in certain activities for collective bargaining purposes, the court stated as follows:

All of the foregoing are rights given to the plaintiff's employees and in none of these activities, either by the employees, or in the administration of the act conducted by the defendant board, do we find any interference with the general supervision of the university. Therefore, those rights and privileges which are granted to the employees by the provisions of [the statute] do not interfere with the constitutional grant of general supervision to the [regents].<sup>72</sup>

In reaching this decision the court relied partially upon the case of *Peters v. Michigan State College* in which the state supreme court in a four to four decision affirmed a lower court holding that Michigan State was not immune from the workmen's compensation act.<sup>73</sup>

In the cases discussed above, the court avoided the all-or-nothing approach taken by the Montana court in the *Brannon* case and the Utah court in the *Board of Examiners* case. The criteria listed below may be helpful in avoiding such an approach and may be helpful to the draftsmen of the new Montana Constitution. Among the factors which should cause courts to generally uphold statutes affecting regents are the following:

1. *Matters which are "legal theories"*. This would involve such legal doctrines as sovereign immunity. The independence of the university is in no way threatened by the application of such a doctrine to the university. The reasons underlying the possible elimination of sovereign immunity are as applicable to the university as to any other department of the state. Of course the university is obviously subject to the law of the state as it has developed in areas such as torts and contracts.
2. *Matters of general social policy*. In cases dealing with such matters as anti-discrimination laws, minimum wage laws, workmen's compensation and other similar matters, the university should be considered subject to such laws even though a direct expenditure of funds by the university may be necessary under them. The grant of authority to the regents should not mean that the university system can be operated under static social policy for the indefinite future.

<sup>71</sup>*Id.* at 862.

<sup>72</sup>*Regents of the University of Michigan v. Labor Mediation Board*, 18 Mich. App. 485, 171 N.W.2d 481 (1969).

<sup>73</sup>320 Mich. 243, 30 N.W.2d 854 (1948).

3. *Employee rights.* This type of issue is similar to the social policy type of statutes. Examples would again include minimum wage laws, collective bargaining laws, laws involving working conditions and other similar matters. Other examples might include "right to privacy" statutes which would limit the power of the regents to require certain types of information from students or employees.

4. *Certain matters affecting physical operations.* Matters such as fire safety regulations and safety requirements on machinery should be binding with respect to university operations. These laws clearly do not involve any attempt to interfere with the essential operations of the university. Similarly, the university should be bound by air pollution standards and other anti-pollution laws.

Matters which should generally cause a court to consider a statute to be in violation of the authority of the regents to govern the university:

1. *Transfer of control to other state agencies.* This is the single most important area in which the authority of the regents can be rapidly diminished. A common example is the type of statute which gives another state agency authority to give prior review to expenditures of university funds. Many other examples of such laws may be cited, including control of purchasing, control of building and building design, control of automobiles, control of accounting procedures and other similar matters. The essential problem with all of these transfers of control is that the degree of control exercised by the agencies involved tends to increase without the knowledge of the legislature. Once such control is lost to other agencies, it is often impossible for the university to regain it.

2. *Powers which can lead indirectly to other forms of control.* This problem is present in all of the examples presented in the above paragraph. For example, the authority of a state controller or board of examiners to control university expenditures may in practice lead to the exercise of control by such an officer or board over many other matters entirely unrelated to his authority. No argument is needed to show that an officer who controls expenditures of university funds could easily exert improper influence on such matters as hiring and firing of professors and other university officials. Of course, this can quickly lead to the filling of university administrative positions with political appointees.

3. *Statutes referring only to the university.* Courts should take a particularly careful look at statutes which might have been applied generally, but in fact were applied only to the university. This type of problem was present in loyalty oath and anti-communist statutes. Problems in this area are diminishing because many of these statutes have been declared invalid on other grounds.

4. *Statutes which are specific acts of management.* Examples of this might be a legislative act requiring the expansion of a particular branch

of the agricultural experiment station or a statute requiring the expansion or elimination of a program at a particular unit of the system. It is also arguable that the legislature should not make appropriations to particular units, but rather should make one appropriation to the regents to be divided as the regents consider appropriate. This would avoid the problem of expanding certain units of the system for the reason that their local legislators are particularly strong within the legislature. Of course, there is no guarantee that the board of regents itself would be entirely free from this sort of bias, but the matter would at least be removed from the political arena.

5. *Academic matters.* If the board of regents has any constitutional authority at all, it certainly has authority to control the academic policies of the university. The concept that academic policy should be based on political considerations and political pressures to which the legislature is subject, is incompatible with the democratic tradition. Courts should refuse to allow the legislature to make any incursions into this area, however slight they may be.<sup>74</sup>

### PROPOSAL FOR THE NEW MONTANA CONSTITUTION

As the material above indicates, it is the view of this writer that the present clause in the Montana Constitution as interpreted by the Montana Supreme Court provides the board of regents with inadequate protection from infringement upon its authority by the legislature. It is submitted that an attempt should be made to draft a clause which would provide such protection subject to reasonable limitations. Such a clause would be drafted in such a manner as to encourage the court to apply the criteria discussed above to cases involving the authority of the regents.

The following clause is suggested as an appropriate way to grant such reasonable authority to the board of regents while subjecting the board to reasonable limitations.

Section 1: The government and control of the academic, financial and administrative affairs of the Montana university system shall be vested in a board of regents, who shall be selected as provided herein. The regents shall have the power, and it shall be their duty, to govern the university system as a public trust, in a manner consistent with the general laws of Montana. The legislature shall pass no law which infringes upon, diminishes or transfers to another body any of the authority provided by this section.

Section 2: The board of regents shall consist of eight members who shall hold office for terms of eight years and who shall be elected by the legislature sitting in joint session. The present appointive members shall hold office until the expiration of their present terms. Two terms shall expire on July 1 of each odd-numbered year, with election of their successors taking place during the legislative session of that year.

<sup>74</sup>An example of such an act is REVISED CODES OF MONTANA, § 75-8902 (1947), passed by the legislature in 1971, which requires all units of the Montana University System and all private colleges in the state to offer a course on alcohol and drug abuse.

The implementation of this section in the new Montana constitution would strengthen the role of the regents without a radical departure from the present situation. The basic aim of the proposal is to keep the control of the university system a safe distance from the political arena, while at the same time keeping the board of regents in sufficiently close contact with the legislature to provide some degree of responsiveness to the views held by the legislature. It is submitted that this proposal would create a balance between the one extreme of control by an aloof, unresponsive board of regents and the other extreme of control directly by the legislature.

The task of determining whether particular legislative acts "infringe upon, diminish or transfer to another body" any of the constitutional authority would remain with the supreme court. While it is the view of this writer that the present version of Article XI, Section 11, would—if properly interpreted—produce results similar to those which should be expected from the proposed revision, the proposal provides substantially more guidelines upon which the court could base its decisions. While no particular phrases in the constitution can provide a guarantee against an erosion of the authority of the regents, the basic power of the regents to govern the university system would be clearly stated.

The limitation that the university system shall be governed "in a manner consistent with the general laws of Montana" would make it clear that, while the legislature may not interfere with regent control of the university system, the regents would not have authority to disregard legislative enactments which cannot be said to infringe upon, diminish or transfer regent authority. The university system would thus be subject to such statutes as those involving minimum wages, workman's compensation, fair employment, safety standards, anti-pollution statutes and other such laws which can be complied with without sacrificing the principle of regent control. Similarly, it would be clear under the proposal that the regents would be subject to legal doctrines developed by the supreme court in such areas as sovereign immunity.

It might be noted that the proposal could be modified if the framers of the new constitution so decide, by deleting the sentence "the legislature shall pass no law which infringes upon, diminishes or transfers to another body any of the authority provided by this section." It might be argued that this sentence is unnecessary in view of the language preceeding it which grants control of the university system to the regents. The sentence is included to avoid the possibility of an over-emphasis by the supreme court of the phrase "in a manner consistent with the general laws of Montana" in such a way as to diminish the grant of authority to the regents.

It is often argued that legislative power to control the purse strings of the university in effect gives the legislature complete control over

the policies of the university. Examples of interference by individual legislators into internal university affairs are no doubt common,<sup>75</sup> but such interference can often be minimized by a recognition on the part of university officials and regents that constitutional authority to govern the university is not a commodity which can be "sold" for a temporary increase in appropriations.

Although the informal influence of legislators is subject to abuse, it can be very beneficial in terms of keeping regents and university administrators aware that legislators have a legitimate interest in university affairs and that legislators must be informed with regard to university affairs to properly determine the appropriate level of funds which should be appropriated to the university. This type of influence is entirely different from direct interference by statute in an internal university affair.

The quality of higher education in Montana will continue to depend more upon the caliber of the state's legislators, regents, and general citizenry than upon the phrasing of this constitutional provision. It is submitted, however, that the adoption of the proposed constitutional provision will provide the necessary framework within which the university system can be improved and creatively adapted to continually changing needs.

<sup>75</sup>See, *Enrollment Limitations on the Oregon State System of Higher Education, 1969-70: Fact or Fiction*, 49 ORE. L. REV. 322 (1970). The author suggests that limitations on enrollment of out-of-state students resulted from pressure from key legislators who threatened to reduce appropriations for the university if such enrollment restrictions were not imposed.





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